**Cruel and Unusual History By GILBERT KING**

**April 23, 2008**

**Op-Ed Contributor**

THE Supreme Court concluded last week, in a 7-2 ruling, that Kentucky’s three-drug method of execution by lethal injection does not violate the Eighth Amendment’s prohibition on cruel and unusual punishment. In his plurality opinion, Chief Justice John Roberts cited a Supreme Court principle from a ruling in 1890 that defines cruelty as limited to punishments that “involve torture or a lingering death.”

But the court was wrong in the 19th century, an error that has infected its jurisprudence for more than 100 years. In this nation’s landmark capital punishment cases, the resultant executions were anything but free from torture and prolonged deaths.

The first of those landmark cases, the 1879 case of Wilkerson v. Utah, was cited by Justice Clarence Thomas, in his concurring opinion in the Kentucky case. The court “had no difficulty concluding that death by firing squad” did not amount to cruel and unusual punishment, Justice Thomas wrote.

Wallace Wilkerson might have begged to differ. Once the Supreme Court affirmed Utah’s right to eradicate him by rifle, Wilkerson was let into a jailyard where he declined to be blindfolded. A sheriff gave the command to fire and Wilkerson braced for the barrage. He moved just enough for the bullets to strike his arm and torso but not his heart.

“My God!” Wilkerson shrieked. “My God! They have missed!” More than 27 minutes passed as Wilkerson bled to death in front of astonished witnesses and a helpless doctor.

Just 11 years later, the Supreme Court heard the case of William Kemmler, who had been sentenced to death by electric chair in New York. The court, in affirming the state’s right to execute Kemmler, ruled that electrocution reduced substantial risks of pain or “a lingering death” when compared to executions by hanging. Kemmler, had he lived through the ensuing execution (and he nearly did), might too have disagreed.

After a thousand volts of current struck Kemmler on Aug. 6, 1890, the smell of burnt flesh permeated the room. He was still breathing. Saliva dripped from his mouth and down his beard as he gasped for air. Nauseated witnesses and a tearful sheriff fled the room as Kemmler’s coat burst into flames.

Another surge was applied, but minutes passed as the current built to a lethal voltage. Some witnesses thought Kemmler was about to regain consciousness, but eight long minutes later, he was pronounced dead.

Perhaps the most egregious case came to the court more than 50 years later. “Lucky” Willie Francis, as the press called him, was a stuttering 17-year-old from St. Martinville, La. In 1946, he walked away from the electric chair known as “Gruesome Gertie” when two executioners (an inmate and a guard) from the state penitentiary at Angola botched the wiring of the chair.

When the switch was thrown, Francis strained against the straps and began rocking and sliding in the chair, pleading with the sheriff and the executioners to halt the proceedings. “I am n-n-not dying!” he screamed. Gov. Jimmie Davis ordered Francis returned to the chair six days later.

Francis’ lawyers obtained a stay, and the case reached the Supreme Court. Justice Felix Frankfurter defined the teenager’s ordeal as an “innocent misadventure.” In the decision, Louisiana ex rel. Francis v. Resweber, the court held that “accidents happen for which no man is to blame,” and that such “an accident, with no suggestion of malevolence” did not violate the Constitution.

Fewer than 24 hours before Francis’ second scheduled execution, his lawyers tried to bring the case before the Supreme Court again. They had obtained affidavits from witnesses stating that the two executioners from Angola were, as one of the witnesses put it, “so drunk it would have been impossible for them to have known what they were doing.” Although the court rejected this last-minute appeal, it noted the “grave nature of the new allegations” and encouraged the lawyers to pursue the matter in state court first, as required by law.

Willie Francis was executed the next morning. Because his case never made it back to the Supreme Court, the ruling lingers, influencing the decisions of today’s justices. In his plurality opinion last week, Chief Justice Roberts called Louisiana’s first attempt at executing Francis an “isolated mishap” that “while regrettable, does not suggest cruelty.”

Justice Clarence Thomas, writing separately, also mentioned the Francis case: “No one suggested that Louisiana was required to implement additional safeguards or alternative procedures in order to reduce the risk of a second malfunction.” In fact, Louisiana did just that. Two weeks after the botched execution of Willie Francis, its Legislature required that the operator of the electric chair “shall be a competent electrician who shall not have been previously convicted of a felony.” This law would have prohibited both executioners from participating in Francis’ failed execution.

The court’s majority opinion in the Willie Francis case acknowledged, “The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence.” Yet the Supreme Court continues to flout that standard.

In its ruling last week, the court once more ignored the consequences of its rulings for men like Wallace Wilkerson, William Kemmler and Willie Francis. The justices cited and applied Wilkerson’s and Kemmler’s cases as if their executions went off without a hitch.

And 60 years after two drunken executioners disregarded the tortured screams of a teenage boy named Willie Francis, the Supreme Court continues to do so.

*Gilbert King is the author of “The Execution of Willie Francis: Race, Murder and the Search for Justice in the American South.”*